No. 91-2042

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SCOTT P. FAGG,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Military Appeals

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BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division represents Navy and Marine Corps personnel on appellate review of court-martial convictions. This Division currently represents several service members who have been convicted of either engaging in or attempting to engage in consensual, private, noncommercial, heterosexual oral sex. Unless the Court grants the petition for certiorari, the Court of Military Appeals' ruling will govern these cases' outcome. Because a service member has a right to petition the Supreme Court for certiorari only if the Court of Military Appeals exercises its discretionary jurisdiction to review the case,[1] these service members may never have an opportunity to file their own petitions for certiorari seeking review of the constitutionality of criminalizing consensual heterosexual oral sex.

[1] 10 U.S.C.A. § 867a (West Supp. 1991); 28 U.S.C.A. § 1259 (West Supp. 1991).

ARGUMENT

I. THERE IS A SPLIT AMONG VARIOUS STATE AND FEDERAL JURISDICTIONS OVER WHETHER THE UNITED STATES CONSTITUTION PROHIBITS THE CRIMINALIZATION OF CONSENSUAL, NONCOMMERCIAL, PRIVATE, HETEROSEXUAL ORAL SEX.

"[A]mong the courts addressing the constitutionality of punishing consensual, heterosexual acts between consenting adults in private, there is a significant division throughout the country." *Schochet v. State*, 580 A.2d 176, 181 (Md. 1990). The United States Court of Military Appeals has ruled that the Constitution does not limit Congress' authority to criminalize heterosexual fellatio. *United States v. Henderson*, 34 M.J. 174, 176-78 (C.M.A. 1992). The Rhode Island Supreme Court, North Carolina Court of Appeals, Indiana Supreme Court, Arizona Supreme Court, New Mexico Supreme Court and, in an opinion which was later reversed, Maryland Court of Special Appeals have ruled that the United States Constitution accords no protection to acts of consensual heterosexual sodomy performed by unmarried adults.[2]

In stark contrast to these decisions, a number of jurisdictions have held that the Constitution precludes the criminalization of consensual, private, noncommercial heterosexual oral sex. The Air Force Court of Military Review's decision in this case, 33 M.J. 618 (A.F.C.M.R. 1991), *rev'd*, 34 M.J. 179 (C.M.A. 1992), the Iowa Supreme Court, the Massachusetts Supreme Judicial Court, the New York Court of Appeals, the Oklahoma Court of

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[2] *State v. Santos*, 413 A.2d 58 (R.I. 1980) (rejecting challenge to proscription of anal intercourse); *State v. Poe*, 252 S.E.2d 843 (N.C. App.), *cert. denied*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 445 U.S. 947 (1980); *Dixon v. State*, 268 N.E.2d 84, 86 (Ind. 1971); *State v. Bateman*, 547 P.2d 6, 9, 10 (Ariz.), *cert. denied*, 429 U.S. 864 (1976); *State v. Elliott*, 551 P.2d 1352 (1976); *Schochet v. State*, 541 A.2d 183 (Md. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990).

Criminal Appeals, and the Pennsylvania Supreme Court have recognized such a constitutional right.[3]

In decisions which preceded *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Seventh Circuit Court of Appeals suggested and two United States District Courts held that the Constitution prohibits states from criminalizing private, consensual acts of sodomy performed by married couples.[4] Additionally, in a post-*Eisenstadt* case, another United States District Court suggested in *dicta* that the Constitution bars states from restricting private acts of heterosexual fellatio performed by consenting married or unmarried adults. *Lovisi v. Slayton*, 363 F. Supp. 620, 624-26 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied sub nom. Lovisi v. Zahrandick*, 429 U.S. 977 (1976).

The Maryland Court of Appeals concluded, "very strong arguments, based on Supreme Court decisions and language in Supreme Court opinions, can be made on both sides of the constitutional right to privacy issue presented here." *Schochet*, 580 A.2d at 181. These strong conflicting arguments demonstrate the need for the Court to resolve this constitutional question.

II. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CONSIDER THE APPROPRIATE USE OF LEGISLATIVE HISTORY IN STATUTORY CONSTRUCTION.

Unlike such cases as *Rose v. Locke*[5] and *Bowers v.*

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[3] *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 481 (Mass. 1974); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981); *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 479 U.S. 890 (1986); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980). *See also State v. Saunders*, 381 A.2d 333 (N.J. 1977) (holding that the federal Constitution precludes criminalization of fornication).

[4] *Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); *Travers v. Paton*, 261 F. Supp. 110 (D. Conn. 1966); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex.), *vacated on other grounds*, 401 U.S. 989 (1970).

[5] 423 U.S. 48 (1975).

Hardwick,[6] this case involves a federal statute. "When the validity of an act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Accordingly, this case could be resolved on statutory construction rather than constitutional grounds.

There are fair interpretations of 10 U.S.C. § 925 which eliminate constitutional concern. The statutory proscriptions against "sodomy" and "unnatural carnal copulation" can be interpreted consistently with their common law definition, which did not include either heterosexual or homosexual oral sex acts. *See generally Rose v. Locke*, 423 U.S. 48, 53 (1975) (Brennan, J., dissenting); *Rex v. Jacobs*, 1 Russ. & Ry. 331, 332, *reprinted in* 168 Eng. Rep. 830, 830 (1817). Alternatively, the Court could apply the rule of lenity to exclude heterosexual oral sex from the statute's scope.

Determining whether such a construction of 10 U.S.C. § 925 would be "plainly contrary to the intent of Congress"[7] involves an important and recurring question of statutory construction: how much weight should a court give to statements in a statute's legislative history?

No Member of Congress discussed the military sodomy statute in any floor or committee debate. The statute's *entire* legislative history consists of one stylistic change proposed by the Senate Armed Services Committee but not ultimately adopted,[8] and "references" and a brief "commentary" in the House hearings:

> *References.*—A.W. 93; proposed A.G.N., article 9 (39); N.C.&B., section 108.
>
> *Commentary.*—This article covers the same elements as the Army and Navy definition of the offense.

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[6] 478 U.S. 186 (1986).

[7] *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988).

[8] S. Rep. No. 486, 81st Cong., 1st Sess. 285 (1949)

Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-First Congress, First Session on H.R. 2498, 81st Cong., 1st Sess. 1233 (1949). The three references, which were not quoted in any committee report, hearing or floor debate dealing with 10 U.S.C. § 925's adoption, do not specifically indicate whether they proscribe heterosexual oral sex.[9] Earlier

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[9] The first of the "references," Article of War 93, 41 Stat. 787, 805 (1920), provided:

> Art. 93. Various Crimes.—Any person subject to military law who commits . . . sodomy . . . shall be punished as a court-martial may direct. . . .

The second reference, proposed Article for the Government of the Navy 9(39), provided:

> Such punishment, other than death, as a court-martial may adjudge may be inflicted upon any person subject to the Articles for the Government of the Navy . . . [who] is guilty of . . . sodomy or any other unnatural sexual act. . . .

H.R. 3687, 80th Cong., 1st Sess. § 11 (1947); S. 1338, 80th Cong., 1st Sess. § 11 (1947).

The final reference, Naval Courts and Boards at § 108 (1937), provided:

> 108. Sodomy.—This is provided for under the 22nd A.G.N. [Article 22 provided: "All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct." Rev. Stat. § 1624, art. 22, *reprinted in* 18 Stat. 274, 280 (1874).]
>
> Charge: Sodomy.
>
> Elements: Sodomy, in its broadest sense, is the carnal copulation by human beings with each other against nature or with a beast, in which sense it includes "the crime against nature," "bestiality," and "buggery." In its narrower sense sodomy is the carnal copulation between human beings per anum. Penetration is a necessary element, and when proven is sufficient for conviction. If there be doubt only as to the completion of the offense, the lesser included offense of scandalous conduct tending to the destruction of good morals should be found proved.
>
> When strictly and impartially proved, this offense well merits strict and impartial punishment; but it is from its nature so easily charged, and the negative so difficult of proof, that the accusation ought to be made out particularly clearly. The evi-

constructions of Article of War 93 did, however, include heterosexual oral sex acts within the statute's scope.[10]

Despite 10 U.S.C. § 925's scant legislative history, the Court of Military Appeals concluded, "It would be sheer fantasy for us to claim to know now that, in 1950, Congress really intended to legalize fellatio in the military." *Henderson*, 34 M.J. at 176. On the contrary, it is sheer fantasy to claim that the Members of Congress who voted on the Uniform Code of Military Justice in 1950 knew whether heterosexual fellatio was then legal or illegal.

Judge Posner observes that "legislators vote on the statutory language rather than on the legislative history." Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 274 (1982); *see also* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 317, 375 ("Relying on extrastatutory materials therefore raises the danger that unrepresentative materials will be accepted as authoritative."). To conclude that Congress intended 10 U.S.C. § 925 to continue the Army's ban on heterosexual fellatio assumes: (1) that the Members were familiar with the House hearings on the legislation; (2) that they examined the "references" included within those hearings; (3) that they then consulted earlier interpretations of those references; and (4) that they adopted the Army's construction rather than the Navy's equivocal definition of "sodomy." *See* Naval Courts and Boards at § 108, *supra* note 9. Such an implausible fiction must be rejected as a means of interpreting a criminal statute.[11] Reviewing this case would allow the Court to assess the propriety of relying on legislative history once- or twice-removed as a means of statutory construction.

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dence should be plain and satisfactory in proportion as the crime is detestable.

[10] *See, e.g.*, Manual for Courts-Martial, U.S. Army, 1949, at ¶ 180*j* discussion; *United States v. Mullarkey*, 77 B.R. 247, 255 (1948).

[11] *Cf. United States v. R.L.C.*, 112 S. Ct. 1329, 1340 (1992) (Scalia, J., concurring) ("necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.").

CONCLUSION

A number of state and federal courts have examined the constitutionality of limiting consensual, noncommercial, private, heterosexual oral sex. No consensus has emerged from these decisions; rather, there has been an "approximately even division among appellate courts." *Schochet*, 580 A.2d at 183. This split among jurisdictions warrants the Court's resolution of the issue.

Alternatively, because the statute at issue is a federal law, the Court may choose to construe the statute in order to avoid the constitutional issue. This course would also lead to an important legal question concerning the appropriate use of legislative history in statutory construction. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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